United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

original - contains affidavit of personal service

76-1570

To be argued by
ALVIN A. SCHALL

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1570

UNITED STATES OF AMERICA,
Appellant,

—against—

HENRY GOMEZ LONDONO,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

DAVID G. TRAGER,
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Eastern District of New York.

ALVIN A. SCHALL,
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Of Counsel.

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ARGUMENT

REPLY TO APPELLEE'S BRIEF

(1)

In his brief, appellee argues that the search warrant was improperly issued under T. 31 U.S.C. §1105. Londono contends that his obligation to file the Form 4790 report had not yet attached when he was arrested. Hence, he claims, it was premature at that time to conclude that there was probable cause to believe that "monetary instruments [were] in the process of transportation and with

respect to which a report required under section 1101" had not been filed. (Emphasis supplied). T. 31 U.S.C. §1105(a). We disagree.

Appellee places a strained and unrealistic interpretation on the word "required" as it appears in section 1105. The statute does not state that a search may only be conducted at a particular point in time. Rather, what triggers the issuance of the warrant is the fact that (i) "monetary instruments are in the process of transportation" and that (ii) those instruments are of the kind with respect to which a report must be filed under section 1101, but such a report has not been filed. Thus, the issuance of the warrant in this case was entirely proper. Londono's luggage, which had gone on board the aircraft, was clearly in the process of transportation, and the agents knew that Form 4790 had not been filed.

Moreover, there was ample basis for the agents to believe that Londono would not comply with the statute, for surely one who is transporting thousands of dollars in currency for an illegal purpose is not likely to report it. Accordingly, since a search warrant may issue for the seizure of "property...intended for use... as the means of committing a criminal offense, "(emphasis supplied) Fed. R. Crim. p. 41(b)(3), the agents were entitled to search Londono's

luggage prior to his departure. The law, serving to anticipate and protect from crime as well as to facilitate punishment, wisely permits search warrants to be used to head off criminality. See, e.g., United States v. Hayes, 388 F. Supp. 470, 474 (W.D. Pa.), aff'd 521 F.2d 1399 (3d Cir. 1975); United States v. Fulcher, 229 F. Supp 456, 457 (D. Maryland 1964).[1/]

(2)

Also to be rejected, we submit, is appellee's contention that Judge Dooling correctly suppressed the statements made by Londono to the agents on February 22, 1976. Contrary to Londono's claim, the court did not find that these statements were "the fruits of an unconstitutional interrogation." Appellee's brief, page 18. Indeed, with respect to the questioning of Londono, Judge Dooling himself stated: "[w]here there is a duty to answer, there is no privilege to lie, and in the present case, there was an unqualified duty to answer a fairly put inquiry and a duty to answer it truthfully. (Emphasis supplied). United

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1/ In addition, the reading of section 1105 which Londono urges would permit a person to evade the currency reporting statute by simply placing his luggage on a flight leaving the country just prior to his and then claiming that he did not have to report the money because he had not yet departed at the time the money left.

States v. Gomez-Londono, 422 F. Supp. 519, 524 (E.D.N.Y. 1976).

Thus, the court did not find that interrogation was "fundamentally unfair" as appellee argues. It simply held that the prosecution had not established a violation of T. 18 U.S.C. §1001. Accordingly, as we argued in our main brief, there was absolutely no basis for the court's suppression of these voluntary statements. T. 18 U.S.C. §3501; United States v. DiGilio, 538 F.2d 972, 985 (3d Cir. 1976); United States v. Crook, 502 F.2d 1378, 1381 (3d Cir. 1974); Cf. United States v. Jacobs, ___F.2d___, Slip Op. 1187 (2d Cir. December 30, 1976).

(3)

Furthemore, since this was a "border search" the Customs agents could have searched Londono's luggage even without a warrant and without probable cause. Londono had checked his luggage for a flight accross international boundaries. And it has been held that the "border search" exception to the probable cause and warrant requirements applies equally to persons departing from the United States, as well as those entering the country, provided a statute authorizes such a search. United States v. Stanley, 545 F.2d 661 (9th Cir. 1976). In Stanley, the Court of Appeals observed that (545 F.2d at 667):

The Fourth Amendment was designed

> to balance the government's interests in enforcing its laws against the individual's interests in his dignity and privacy. A person leaving the country belongs to a class whose members sometimes violate certain laws in leaving. On crossing a border, he is on notice that a search may be made, and his privacy is arguably less invaded by such search.
>
> * * * *
>
> Thus both incoming and outgoing border-crossing searches have several features in common: (1) the government is interested in protecting some interest of United States citizens, such as restriction of illicit international drug trade, (2) there is a likelihood of smuggling attempts at the border, (3) there is difficulty in detecting drug smuggling, (4) the individual is on notice that his privacy may be invaded when he crosses the border, and (5) he will be searched only because of his membership in a morally neutral class.

Here, the search was authorized by Section 1581(a) of Title 19:

> (a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States * * * without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

In short, it was not necessary for the agents here to obtain a warrant before they searched Londono's

luggage. Thus, it was clearly error for Judge Dooling to suppress the evidence on the ground that the affidavit for the warrant which was obtained was "insufficient in law." United States v. Gomez-Londono, supra, 422 F. Supp. at 526.

CONCLUSION

The order of the district court suppressing the evidence should be reversed.

Dated: February 25, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

VALERIE M. BROWN, being duly sworn, says that he is employed in the office of the United States Attorney for the Eastern District of New York. That on the 25th day of February, 1977, he served ~~a true copy~~ two copies of the annexed Reply Brief for Appellant on the office of Ivan Fisher, Esq. attorney for Appellee herein, located at 410 Park Avenue New York, N.Y. 10022, Borough of Manhattan, City of New York, by leaving a true copy of same with his clerk or other person in charge of said office.

Valerie M. Brown
VALERIE M. BROWN

Sworn to before me this
25th day of February, 1977

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977